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No. 416

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES, PETITIONER

v.

WYMAN, PARTRIDGE & COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims is reported in 41 F. (2d) 886.

JURISDICTION

The judgment of the Court of Claims was rendered June 2, 1930. (R. 17.) Petition for certiorari was filed September 2, 1930. (R. 17.) Certiorari was granted October 20, 1930. (R. 19.) Jurisdiction is conferred upon this Court by Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

The broad general question involved in this and the other cases in this group is this: Where a tax is

assessed within time and prior to June 2, 1924 (the effective date of the Revenue Act of 1924), but a claim in abatement is filed and collection is deferred until after the statutory time therefor has expired, does Section 611 of the Revenue Act of 1928 bar recovery of the tax so paid?

If this question should be answered in the affirmative, this additional question is presented in the instant case: Whether recovery of the tax should be allowed because of the fact that collection was made after the enactment of Section 1106 (a) of the Revenue Act of 1926 and before its retroactive repeal by Section 612 of the Revenue Act of 1928.

STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra,* pp. 20–21.

STATEMENT

On June 14, 1919, the respondent filed its income and excess profits tax return for the fiscal year ended November 30, 1918, and during the same year paid the tax thereon shown. (R. 8.) In May, 1924, and within the statutory period, the Commissioner assessed an additional tax. (R. 8.) On June 11, 1924, in order to avoid immediate payment and to obtain further consideration of the tax liability, a claim for abatement of the assessment was filed. (R. 8.) The collection of the additional assessment was deferred until August 17, 1926. The period

for collection as extended by waivers expired December 31, 1925. On February 26, 1926, Section 1106 (a) of the Revenue Act of 1926 was enacted (*infra,* p. 20). On April 21, 1926, the Commissioner decided the claim in abatement and abated a part of the assessment. The balance of the assessment, $45,992.87, was paid under protest on August 17, 1926, while Section 1106 (a) was in force. (R. 8.)

Claim for refund, on the ground that the collection was made after the expiration of the statutory period for collection, was filed July 18, 1927, and rejected April 4, 1928. (R. 8.) Suit was instituted in the Court of Claims on June 7, 1928, to recover the amount paid. (R. 5.)

The Government defended on the ground that Section 611 of the Revenue Act of 1928 barred recovery. The court rendered judgment for the taxpayer. (R. 17.)

SPECIFICATION OF ERRORS

1. The court erred in ruling that Section 1106 (a) of the Revenue Act of 1926 was not retroactively repealed by Section 612 of the Revenue Act of 1928, thereby in effect holding Section 612 of the Revenue Act of 1928 unconstitutional.

2. The court erred in construing the provisions of Section 1106 (a) to have created a "vested right" in the respondent as against the United States.

3. The court erred in ruling that the provisions of Sections 607 and 611 of the Revenue Act of 1928

did not preclude a refund or recovery of the amount in suit.

4. The court erred in refusing to recognize the power of Congress to specify the conditions under which a recovery may be had from the United States of moneys paid to or collected by it as taxes.

5. The court erred in giving judgment for the respondent.

SUMMARY OF ARGUMENT

Section 611 of the Revenue Act of 1928 should be construed to prevent recovery of taxes collected after the statutory time for collection had expired, if claim in abatement was filed and collection stayed. This was recognized by the Court of Claims in *Magee* v. *United States*, 37 F. (2d) 763 (now pending here on certiorari, No. 65, present term).

The only possible difference between that case and the instant case is that the tax was collected after the enactment of Section 1106 (a) in the instant case and before Section 1106 (a) in that case. But, we submit, this should not lead to a different result.

Whatever may be the proper construction of Section 1106 (a), the power of Congress to prescribe the conditions under which recovery of taxes from the United States may be had was not limited by that Section. Regardless of the construction of Section 1106 (a), its retroactive repeal was as proper an exercise of the right of Congress to con-

trol refunds of taxes as was the enactment of Section 611 of the Revenue Act of 1928. This was recognized by the Court of Claims and two Circuit Courts of Appeals to be a valid enactment. Therefore, Section 611 barred recovery in this case, whether Congress could retroactively repeal Section 1106 (a) or not, and recovery was barred by Section 611, apart from the repeal of Section 1106 (a).

ARGUMENT

I

Section 611 of the Revenue Act of 1928 should be construed to prevent recovery of taxes collected after the the statutory time therefor had expired, if claim in abatement was filed and the collection stayed even until after the passage of the Revenue Act of 1926

In the case of *Graham and Foster* v. *Goodcell,* now pending in this Court, No. 36, October Term, 1930, assigned for argument before this case, the brief for the respondent fully presents the question of the effect of Section 611 of the Revenue Act of 1928 (which is printed on pp. 20–21, *infra*). We there contend that Section 611 should be interpreted to prevent recovery of taxes paid out of time, if a claim in abatement was filed and the collection stayed.

The distinctions between that case and this are as follows: (1) In that case the suit was against the Collector; here it is against the United States. (2) In that case the claim in abatement was acted upon

before collection was barred; in this case the action on the claim in abatement was delayed until the period for collection had expired. (3) In that case the suit was instituted prior to the enactment of the Revenue Act of 1928 and during the life of Section 1106 (a) of the Revenue Act of 1926; in this case it was instituted after the repeal of Section 1106 (a) by the Act of 1928. (4) In that case the tax was collected before the enactment of Section 1106 (a) of the Revenue Act of 1926; in this case the tax was collected after the enactment of Section 1106 (a) and before its repeal.

The first three of these distinctions are all present in *Magee* v. *United States,* No. 65, October Term, 1930, and they are discussed in the Government's brief in that case. The present case will be controlled by the decision in the *Magee case,* unless the payment of the tax after the enactment of Section 1106 (a) of the Revenue Act of 1926 (p. 20, *infra*) and before its repeal, is a controlling distinction.

The language of Section 611 furnishes no indication that it was not intended to apply to collections made while the 1926 Act was in force. The fact that Section 612 (*infra,* p. 21) expressly repeals Section 1106 (a) of the 1926 Act as of the date of its enactment shows that collections made while the latter act was effective are not to be treated differently from any other late collections. The majority opinion of the court below did not construe Section 611 otherwise than as we contend, but a concurring opinion did.

The reasoning of the concurring opinion as to construction is, we submit, erroneous. The view there expressed was that although it was not beyond the power of Congress to prevent recovery in cases such as this, and although the power of Congress to impose the tax and change the statute of limitations was broad enough to warrant a recreation of the liability which had become extinguished, Congress in fact had not revived that liability. It states that by Section 1106 (a) (p. 20, *infra*) Congress extinguished the liability for the 1918 tax and that at the time of its collection, which was after the statutory period, as extended by waivers, had run, there was no authority of law to collect. Upon the principle that a repeal of a repealing Act does not revive the repealed Act, the opinion concludes that the liability to pay the tax was not revived by Section 612 of the Revenue Act of 1928. But Section 1106 (a) is not a repealing Act. It did not enact any new statute of limitations and did not purport to repeal any statute of limitations. At best it merely declared the effect of the existing statutes of limitations. Instead of repealing those limitations it operated upon them. If Section 1106 (a) had repealed the statute of limitations, it could not operate, because no new statute of limitations was created. The premise upon which the concurring opinion is founded is unsound. The reasoning of the opinion otherwise supports the position of the petitioner here as to the constitutionality of Sections 611 and 612.

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II

Section 611 of the Revenue Act of 1928 as so construed is constitutional when applied to a tax collected while section 1106 (a) of the Revenue Act of 1926 was in effect

The power of Congress over matters of taxation is discussed on pp. 10–37, of our brief in *Graham* v. *Goodcell* (No. 36, present term). We submit that Section 611 of the Act of 1928 was a proper exercise of that power. It merely deprived taxpayers of their existing rights to recover taxes collected after the statutory period for collection had expired. We contend that Section 1106 (a) really gave taxpayers no substantial rights which they had not possessed before its passage. If so, it is obvious that the court below erred in holding that it conferred "vested rights" which could not be affected by subsequent legislation. The construction and effect of Section 1106 (a) we discuss under point A, *infra,* pp. 8–14.

We also submit that even if that section can be construed as conferring new and substantial rights on taxpayers, it was within the power of Congress later to deprive the taxpayers of those rights. See point B, pp. 15–18, *infra.*

A. SECTION 1106 (a) OF THE REVENUE ACT OF 1926 GAVE THE TAXPAYER NO "VESTED RIGHTS"

Section 1106 (a) of the Revenue Act of 1926, provided:

> The bar of the statute of limitations against the United States in respect of any

> internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax.

Because the tax involved in the present case was paid while this section was in force the court below held that "the rights of the plaintiff had vested before the enactment of the 1928 act" (R. 13), and that consequently the provisions of the 1928 Act could not constitutionally be applied to prevent recovery in this case. We maintain that the Court of Claims misconstrued Section 1106 (a). In order to appreciate the purpose and effect of this section it is necessary to understand the situation which gave rise to its enactment.

The apparent cause for the enactment of this section was the confusion resulting from a decision by the Court of Claims. On December 7, 1925, that court decided *Toxaway Mills* v. *United States,* 61 C. Cls. 363. There it was held, in substance, that where a tax was collected after the period for collection had expired, the taxpayer could not recover for that reason alone, but must show further that the tax computed with-

out regard to the statute of limitations had in fact been overpaid. This decision was later reversed by this Court on confession of error by the Solicitor General, 273 U. S. 781. After the opinion in the Court of Claims and before its reversal by this Court, the Revenue Bill of 1926 was under consideration by Congress. The Bill in its original form was amended by inserting Section 1106 (a).

The amendment was first proposed in the Senate and was as follows:

> SEC. 1106 (a). The bar of the statute of limitations against the United States and against the taxpayer in respect of any internal revenue tax shall not only operate to bar the remedy but shall extinguish the liability.

The purpose of the amendment was explained upon the floor of the Senate by Senator Reed, the member of the Finance Committee in charge of the bill, as follows (Congressional Record, 69th Congress, 1st Session, Vol. 67, Part 4, p. 3531):

> Mr. President, just a word in explanation of this amendment. The necessity for it arises from a very peculiar case. In a recent decision in the Court of Claims it has been held, in substance, that after the statute of limitations has run against the collection of a tax, the collector may nevertheless issue his distraint and collect the tax by a distraint, and then if the taxpayer brings suit against the United States to recover it back, he, being the plaintiff, can not plead the statute of limitations, although the United States would have

> been barred from a suit for the tax because the statute had run. It is a preposterous result, it seems to me, and a very great hardship to the taxpayer, to allow such a condition to continue and while I feel reasonably confident, with all respect to the Court of Claims, that that case will be reversed on appeal, I do not think we ought to allow even a possibility that it will not remain, and we ought to correct it now.

This amendment was adopted by the Senate. But when the Senate Bill was referred to the Conference Committee the Section was changed to its final form. The report of the Conference Committee (House Report No. 356, 69th Congress, 1st Session, p. 55) contained the following statement:

> *Amendment No. 170.*—This amendment provides that the bar of the statute of limitations against the United States and against the taxpayer shall operate to bar the remedy and also extinguish the liability. This amendment is deemed advisable because of an opinion in a recent decision of the Court of Claims (*Toxaway Mills* v. *U. S.*), although in a case presenting the specific point this opinion very probably would not be followed by the Supreme Court. (See Taft, C. J., in *Graham* v. *Dupont*, 262 U. S. 234, 256, 268.) The House recedes with an amendment making certain that the provision does not require a refund to a taxpayer for any year (even though the statute has run against the Government) unless he had in fact overpaid his tax for that year,

> nor require a taxpayer to pay an additional tax for any year (even though the statute has run against his claims or suit for refund) unless he had in fact underpaid his tax for that year. Obviously, this section does not apply in the case of fraud or in the case of a waiver.

The obvious intent of Congress in enacting Section 1106 (a) was to insure to the taxpayer a right of recovery if the tax was collected out of time. It is equally apparent from this legislative history that the proper construction to be placed upon the qualifying clause of Section 1106 (a) added by the House Conferees is that it was intended to be a safeguard, deemed necessary to prevent the Government from being prejudiced in situations which might arise out of circumstances like these:

The period of the statute of limitations against additional assessments was five years from the due date of the return, and the period against the filing of claims for refund was four years from the payment of the tax; but the refund might be made at any time thereafter if the claim was filed in time. It frequently might happen that a taxpayer could show that he had erroneously included an item as income and that the portion of the total tax assessed and paid on that item should be refunded. Although his claim had been filed in time, the determination that the refund was allowable might occur long after the period for assessment of additional taxes. In making the adjustment sought by the taxpayer, which might not take place until after the

period for assessment had expired, it might appear that some other, and perhaps larger, item had been erroneously omitted from the determined taxable income. But the five years for assessment of a tax on that item had run. The refund was allowable but an additional assessment and collection were barred. The qualifying clause in Section 1106 (a) would make certain that in such a case refund was not to be made unless after making the counteradjustments of the taxable income it would appear that the taxpayer had, in fact, overpaid the tax by the payment which had already been made.

This construction is consistent with the Conference Report, *supra*, pp. 11–12, and gives effect to each word in the section. It is likewise consistent with the decisions of this Court in *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346, and in the *Toxaway Mills case*, *supra*.

The court below construed Section 1106 (a) to deny a recovery founded on a collection out of time in cases where the collection was made before the passage of Section 1106 (a), unless the amount collected was in excess of the correct tax. (R. 10.) This, we submit, can not be correct, because of the decision of this Court in the *New York & Albany Lighterage case* and *Toxaway Mills case*. The effect of those cases was that where a tax is collected out of time, refund should be made for that reason alone. The conclusion of the court below is founded on an erroneous conception of the effect of the running of the statute of limitations. The

Court of Claims apparently has adhered to the views expressed in its original opinion in the *Toxaway Mills case*. From this it deduced that the effect of Section 1106 (a) was to create in the taxpayer for the first time a right to recover taxes solely because they were collected out of time, but only taxes paid after its enactment.

In cases of collection before the enactment of Section 1106 (a), the taxpayer under the applicable jurisdictional acts (Section 145 of the Judicial Code and Section 3220 of the Revised Statutes) had a right of action founded on the illegality of the collection. In cases of collection during the life of Section 1106 (a) there was the same right to recovery for the same reason. But the taxpayer was not dependent upon the extinguishment of the liability as a basis of his cause of action. The fact that the tax was illegally collected was sufficient. In such cases Section 3220 of the Revised Statutes authorized the Commissioner to refund. Upon rejection of a timely application therefor by the Commissioner, the taxpayer could invoke Section 145 of the Judicial Code and bring the action. The question then before the court would be: Has the Commissioner of Internal Revenue failed to give the taxpayer the relief which Congress has authorized?

Consequently, we maintain that Section 1106 (a) gave taxpayers no substantial new rights, but that it merely affirmed a right which they already had.

B. SECTION 1106 (A) OF THE REVENUE ACT OF 1926 WAS EFFECTIVELY REPEALED AS OF THE DATE OF ITS ENACTMENT BY SECTION 612 OF THE REVENUE ACT OF 1928 AND ANY RIGHTS ACCRUING THEREUNDER CAN NOT NOW BE ENFORCED

Section 1106 (a) of the Revenue Act of 1928 has been repealed retroactively as of the date of its enactment by Section 612 of the Revenue Act of 1928 (*infra*, p. 21).

Although the power of Congress to affect rights between individuals is limited by the Fifth Amendment, there is no such limit regarding claims against the sovereign. As was stated in the concurring opinion in the court below (R. 16):

> A tax that is due is a debt due the sovereign and the ordinary statute of limitation relates only to the remedy and the repeal of the limitation provision, even after the debt has become barred, does not deprive the citizen of his property without due process of law in violation of the fifth amendment. (*Campbell* v. *Holt*, 115 U. S. 620; *Wm. Danzer & Co., Inc.*, v. *Gulf & Ship Island R. R. Co.*, 268 U. S. 633.) Is the situation any different where a citizen is indebted to the Government for a valid tax, the liability for payment of which he is relieved, and shortly thereafter Congress decides to recreate the liability and remove the bar of the statute? The sovereign is not bound by the statute of limitation except by its consent, and in respect of taxes it would seem that, although the tax had become

barred, Congress could have repealed the statute of limitations and thereby revived the right of the Government to collect. (*Campbell* v. *Holt, supra.*) May not Congress also, even though the liability for a tax as to which the statute has run has been extinguished, repeal the limitation statute and the statute extinguishing the liability for the tax and by appropriate legislation recreate the liability? It would seem that the only objection that could be raised to such action would be the power of Congress retroactively to recreate a liability for a tax that, beyond question, had once been lawfully imposed. (Cf. *The City of Seattle* v. *Kelleher*, 195 U. S. 351; *United States* v. *Heinszen & Co.*, 206 U. S. 370; *Billings* v. *United States*, 232 U. S. 261; *Rafferty* v. *Smith, Bell & Co., Ltd.*, 257 U. S. 226.) If Congress has authority retroactively to impose a tax and thereby create a debt for the tax to the sovereign in the first instance, has it not equal authority to reimpose and revive a tax that has been abrogated by a statute of limitation that relieved the taxpayer from liability? The case of *Wm. Danzer & Co., Inc.* v. *Gulf & Ship Island R. R. Co., supra*, was a suit for damages between private persons and the court held that to construe section 206 (f) of the transportation act, suspending the statute of limitations during Federal control of railroads, retroactively, so as to create a liability that was barred at the time of its enact-

> ment, would be to deprive the railroad company of its property without due process of law in violation of the fifth amendment. That case is not necessarily authority for the proposition that the same rule would apply to the sovereign power of taxation.

The right of action recognized by Section 1706 (a) was one allowed by the sovereign against itself. No such right is protected by the Constitution. The right, being given by Congress, is subject to modification or defeat by Congress. No right of action against the sovereign can be vested as against the power of the United States to change the basis of the claimed right. So long as the money has not been refunded to the respondent, the control of the Government over it is complete. *United States* v. *Heinszen & Co.*, 206 U. S. 370. This follows from the immunity of the sovereign from suit. In *Beers* v. *Arkansas*, 20 How. 527, 529, Chief Justice Taney said:

> * * * as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.

In the instant case the respondent had no vested right in the continuation of the law regarding the limitations against collection nor in Section 1106 (a) as to the effect of the running of the statute of

limitations. Its rights were subject to control by Congress. There is, therefore, no constitutional prohibition against the retroactive repeal of Section 1106 (a). The tax having been collected, the only right that the respondent had by reason of Section 1106 (a) was to assert a claim for moneys collected after the period of limitation for collection. This was a right of action against the United States which was enforcible only at the will of Congress. Until that right had been prosecuted to a conclusion and the money repaid, it was wholly subject to the action of Congress. The effect of Sections 607, 611, and 612 of the Revenue Act of 1928 is to ratify the collection of taxes out of time in the class specified, just as the effect of the Act of June 30, 1906, was to ratify the collection of the duties involved in *United States* v. *Heinszen Co.*, 206 U. S. 370.

We submit that Section 612 of the Revenue Act of 1928 effectively repeals Section 1106 (a) as it purports to do, and that this retroactive repeal is constitutional. With Section 1106 (a) repealed as of the date of its enactment, this case is identical in principle with the *Magee case*. We submit that the conclusion of the Court of Claims in that case, that Section 611 barred recovery by the taxpayer, is correct and should control this case.

CONCLUSION

The judgment of the Court of Claims should be reversed and the case remanded with instructions to dismiss the petition.

Respectfully submitted.

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APPENDIX

Section 1106 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 113, provides:

> The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax. (U. S. C. App. Title 26, Sec. 1249.)

The Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875, provides in part as follows:

> SEC. 607. *Effect of expiration of period of limitation against United States.*—Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (U. S. C. Sup. III, Title 26, Sec. 2607.)

SEC. 611. *Collections stayed by claim in abatement.*—If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection. (U. S. C. Sup. III, Title 26, Sec. 2611.)

SEC. 612. *Repeal of Section 1106 (a) of 1926 Act.*—Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926. (U. S. C. Sup. III, Title 26, Sec. 2612.)

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